Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October 1996 Term

ANGELA NOELLE
Petitioner,

v.

STATE OF TEXAS,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE THIRD COURT OF APPEALS OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Was the prosecution for driving while intoxicated barred by the Fifth and Fourteenth Amendments to the United States Constitution because Petitioner's driving license had already been suspended for the same offense?

2. Was the prosecution for driving while intoxicated barred by the Fifth and Fourteenth Amendments to the United States Constitution because Petitioner had already been put in jeopardy for the same offense?

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CITATION TO OPINIONS AND ORDERS BELOW

The opinion of the court below is unpublished. *Ex Parte Noelle*, No. 03-995-007030CR (Tex.App. -- Austin, delivered May 1, 1996). A copy of said opinion is attached in the Appendix. (See Appendix at Tab "A")

JURISDICTION

This cause arises from a pretrial application for writ of habeas corpus, which was denied by the state district court after a hearing on the merits. The Third Court of Appeals affirmed the trial court's judgment. *Ex Parte Noelle*, No. 03-995-00703-CR (Tex.App. -- Austin, delivered May 1, 1996)(unpublished) (Appendix, A-1). Petitioner's Petition for Discretionary Review filed in the Texas Court of Criminal Appeals was refused without written opinion on February 12, 1996. (Appendix, A-2). No motions for rehearing were filed in either state appellate court. This Court has jurisdiction under the Fifth and Fourteenth Amendments to the United States Constitution, as well as 28 U.S.C. § 1257. This petition is due on or before May 13, 1997, and is timely filed.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against hmself, nor be deprived of life, liberty, or property, without due process of law[.]

U.S. CONST., amend. V.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST., amend. XIV, Section 1.

TEX. TRANSPORTATION CODE, § 524.001, *et seq.* (Appendix, A-10)

STATEMENT OF THE CASE

A. Prior Proceedings

Petitioner was arrested and charged with the offense of driving while intoxicated (henceforth "DWI"). Her drivers license was suspended after an administrative hearing. Shortly thereafter, Petitioner filed a pretrial application for writ of habeas corpus, alleging the DWI prosecution was barred by double jeopardy. Relief was denied after a hearing. Petitioner perfected an appeal to the Third Court of Appeals, which affirmed the judgment of the trial court. *Ex Parte Noelle*, No. 03-995-00703-CR (Tex.App. -- Austin, delivered May 1, 1996)(unpublished). Petitioner then filed a petition for discretionary review in the Texas Court of Criminal Appeals, which was refused without written opinion.

B. Facts Relevant to the Questions Presented

After her arrest for driving while intoxicated, on February 9, 1995, Petitioner was notified by letter from the Texas Department of Public Safety (henceforth "DPS") that a driver's license suspension hearing which she had requested under Article

6687b-1, TEX.REV.CIV. STATS.[1], would be held on March 1, 1995. Petitioner was informed in the letter that DPS intended to show by a preponderance of the evidence:

> THAT, on or about 01/14/95 [Petitioner] had an alcohol concentration of a level specified in . . . Section 49.01 Texas Penal Code, while driving or in actual physical control of a motor vehicle in a public place.

(Appendix, Tab A-3) DPS also intended to show that "reasonable suspicion to stop [Petitioner] or probable cause to arrest [Petitioner] existed." (Appendix, Tab A-3).

After the hearing, on April 5, 1995, the administrative law judge issued findings of fact and conclusions of law determining that DPS was authorized to suspend Petitioner's drivers license for 60 days. The administrative judge specifically found that:

> probable cause to arrest the [Petitioner] existed, in that probable cause existed that [Petitioner] was intoxicated while driving or in control of a motor vehicle in a public place as demonstrated by lost balance on leg stand -- lost balance while lifting foot, did not count, couldn't say ABC's and probable cause is stipulated to by [Petitioner]/odor of alcohol[,] slurred speech.

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[1] Now codified in TEX.TRANSPORTATION CODE, § 524.001, *et seq.*

(Appendix, A-4). Moreover:

> [Petitioner] was driving or in control of a motor vehicle . . . in a public place . . . with an alcohol concentration . . . in excess of .10 grams of alcohol per 210 liters of breath . . ..

(Appendix, A-4).

Ten days after the administrative judge made his decision, DPS suspended Petitioner's drivers license for 60 days because she had:

> provided a specimen of blood or breath with the analysis showing an alcohol concentration of a level specified in Section 49.01, Texas Penal Code, following an arrest for an offense prohibiting the operation of a motor vehicle while intoxicated.

(Appendix, A-5). DPS also demanded that she surrender her license to drive. (Appendix,A-5).

The Williamson County Attorney's office, meanwhile, had filed an information in County Court at Law #2 formally charging Petitioner with operating a motor vehicle in a public place when she had a blood/alcohol concentration of 0.10 or more. After being so charged, Petitioner filed an application for writ of habeas corpus in the Williamson County Court, alleging that the prosecution was

barred by the double jeopardy provisions of both the state and federal constitutions. On the advice of the State, the county court refused to issue the writ. Petitioner then filed the same pretrial application in the 167th District Court of Travis County, which did issue the writ. On November 27, after hearing evidence and argument of counsel, the district court denied the application on its merits. (Appendix, A-6) Petitioner then perfected an interlocutory appeal pursuant to TEX. R. APP. PRO. 44.

C. **How the Issues Were Raised and Decided Below**

Petitioner raised each of these issues in the Court of Appeals. First, she argued that the DWI prosecution was barred by the Fifth and Fourteenth Amendments to the United States constitution because her driving license had already been suspended as punishment. In rejecting this contention, the court below relied heavily on its previous opinion in *Ex parte Arnold*, 916 S.W.2d 640 (Tex.App. -- Austin 1996, *pet.ref'd*) which held that "the forfeiture of a driver's license did not constitute 'punishment' so as to bar prosecution for the same DWI offense." *Ex parte Noelle*, slip op.

at 2. The basis for the Court's decision was its discovery of a "bright line distinction" between driver's license suspensions for the commission of DWI's, and every other decision by the Supreme Court reviewed in *Arnold,* i.e., *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989). This distinction is a "bright line" rule in the same sense that DWI is a bright line exception to whatever constitutional principle might otherwise regulate its enforcement. *See, e.g., South Dakota v. Neville,* 459 U.S. 553 (1983)(use of refusal in DWI cases doesn't offend right against self-incrimination); *Michigan v. Sitz*, 496 U.S. 444 (1990)(DWI roadblocks permitted under 4th Amendment).

As her second contention Petitioner argued that, notwithstanding the issue whether administrative license suspension is "punishment" for purposes of the federal double jeopardy clause, her prosecution for DWI was barred by the Fifth and Fourteenth

Amendments to the United States constitution because she had already been placed in jeopardy for the same offense. Petitioner pointed out that Administrative License Revocation (henceforth "ALR") proceedings have all the essential features of a criminal prosecution:

> (1) The State issues an accusatory pleading and commences an adversarial proceeding after arrest;
>
> (2) The State seeks to prove that the defendant is guilty of a criminal offense, namely, driving while intoxicated;
>
> (3) A fixed penalty is imposed if the State proves the offense alleged;
>
> (4) Findings are made and a judgment is entered.

The Court of Appeals addressed and disposed of this contention as follows:

> [T]he Double Jeopardy Clause prevents a second prosecution for the same offense after acquittal as well as a second prosecution after conviction. [citation omitted] Petitioner's pending criminal prosecution does not implicate these latter protections, because she has not yet been prosecuted for the offense. The Department of Public Safety revoked Petitioner's license through an exercise of its administrative and regulatory power. [citation omitted] Petitioner has been subjected only to an

> administrative proceeding; the hearing before the administrative law judge did not subject Petitioner to a trial in a court of competent jurisdiction, and did not amount to a prosecution. *See Kepner v. United States*, 195 U.S. 100, 128 (1904)(one is placed in jeopardy when one is put to trial in a court of competent jurisdiction on an accusation). Furthermore, Petitioner has provided no authority for the proposition that an administrative proceeding with no possibility of punishment can be characterized as a criminal prosecution.

Noelle, slip op. at 4. Under this rationale, a license suspension is not only ***not*** punishment, it does not even carry the "possibility of punishment." The appellate court has implicitly narrowed the meaning of "punishment" to preclude anything other than actual incarceration. This interpretation is squarely contrary to *Halper, Austin* and *Kurth Ranch*.

WHY THIS COURT SHOULD GRANT REVIEW

A. Summary of Argument

This Court should grant review because the Court of Appeals has decided an important question of federal law that has not been, but should be settled by this Honorable Court, namely

whether a prosecution for driving while intoxicated is barred by federal double jeopardy provisions when the defendant has been previously subjected to administrative license revocation procedures. In addition, the decision of the Court of Appeals is in conflict with applicable decisions of this Court, namely *Dept. of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Austin v. United States*, 509 U.S. 602, 113 S.Ct. 2801, 125 L.Ed.2d 488 (1993); and *United States v. Halper*, 490 U.S. 435, 109 S.Ct. 1892, 104 L.Ed.2d 487 (1989).

B. **Expansion of Argument Relating to Question One**

i. The legislative history indicates ALR was intended to be strictly punitive.

In *Ex parte Arnold*, 916 S.W.2d 640, 642 (Tex.App. -- Austin 1996, *pet. ref'd*), the Court of Appeals reviewed *Kurth Ranch, Austin* and *Halper* and identified the "common thread running though each of [these] cases[:]" to-wit: "the government's attempt to forfeit property or raise revenue as punishment, in addition to seeking punishment for the offense." *Arnold* at 641. This is a narrow, and misdirected, extrapolation from these cases;

the darker commonality among these cases and the instant one is the government's invention and use of other legal means to accomplish the goals of the criminal law while simultaneously dispensing with criminal procedure and circumventing constitutional protections.

The ALR law was enacted shortly after Texas's drug tax scheme passed its first constitutional challenge in *Jackson v. Sharp*, 846 S.W.2d 144 (Tex.App. -- Austin 1993, *no writ*). In that case, the plaintiff pointed out to the appellate court that the "drug tax" scheme was a sham legal apparatus invented by legislators with some very specific intentions in mind. *Id.* at 146. The Court of Appeals addressed this legislative history in the same way the legislative history of ALR was addressed: by pretending it didn't exist. The Court then found the "drug tax" to be little more than a revenue-raising measure and dispatched the plaintiff's challenges accordingly. *Id.* at 147. ALR was passed during the next legislative session, and the Court of Appeals found ALR to be little more than an administrative scheme. *Arnold*, *supra*.

Three years after the *Jackson* decision, and with the

guidance of this Court's landmark decision in *Kurth Ranch*, the Texas Court of Criminal Appeals held the drug tax violated federal jeopardy provisions because prosecution after payment of the tax constituted further punishment and was, therefore, unconstitutional. *Ex Parte Stennett*, __S.W.2d __ (Tex.Crim.App. No. 1013-95, delivered October 16, 1996). The Court's reasoning was based entirely on the legislative history of the statute, which indicated the clear intent of lawmakers in enacting it was purely punitive, and had absolutely no remedial effect. The court pointed to this excerpt, in which legislators reasoned:

> The threat of a tax levy large enough to wipe out any illegal profits should add to the deterrent value of a prison sentence and criminal fine for drug dealing. The tax would be due even if the dealer escaped criminal conviction on some technicality. . . . This is a law-and-order bill, not a revenue bill.

Stennett, *supra,* slip op. at 8, quoting from the House Research Organization bill analysis, H.B. 24, May 9, 1989.

The Texas Court of Criminal Appeals also has recently upheld the constitutionality of the ALR statutes. *Ex Parte Tharp*, 935 S.W.2d 424 (Tex.Crim. App. 1996). In *Tharp* the Court of

Criminal Appeals did not consider the complete legislative history as it had in *Stennett*. The Court quoted selected portions of the legislative hearings, but ignored those which indicate the clearly punitive nature of ALR. *Tharp*, 935 S.W.2d at 160, n.1. As Petitioner pointed out to that Court in her request for discretionary review, ALR is no different from the drug tax, or *Halper, Kurth Ranch* or *Austin*, as its legislative history reveals:

> [T]he general public has to be convinced that if they drink and drive, ***the consequences will be swift, sure and severe enough to get their attention***. In many jurisdictions, this cannot be done swiftly and surely. . . . There is no connection between the act of drinking and driving and a penalty. The offender does not associate the act with any kind of punishment.

Senate State Affairs Committee Hearings, March 31, 1993, Senate Bill 1, testimony of Bill Holden, Dep't of Transportation, Wash. D.C. (See Appendix, A-8).

> The way it's set up now, if a person is driving while intoxicated and arrested, the only real punishment they get might be a fine, because most DWI's in Tarrant County are probated . . . There's really no punishment. It's not very harsh. . . . [T]his bill would make it become a little more harsh. . . . ***They will get a punishment of some sort.***

Committee Hearings, testimony of Rachel De Joyes, Fort Worth Police Department. (See Appendix, A-8). Additionally, ALR

> would ensure that drivers who were legally drunk would have their licenses suspended - no if, ands or buts. . . . A tough, uniformly applied penalty of license suspension would make people think long and hard before they got behind the wheel drunk. As long as there is no fear of punishment, someone who has been drinking will feel no compunction about driving; ***punishment that is certain and swift, however, can change people's habits for the better.***

HOUSE RESEARCH ORGANIZATION, House Floor Report, May 25, 1993, at 16-17. (See Appendix, A-9) (emphases added) There is little difference between the above quoted excerpts and those quoted by the Court of Criminal Appeals in its *Stennett* opinion. The clear intent behind both statutes is to punish the offender twice, first by suspending his license, then punishing him a second time by imposing a criminal sanction.

And therein lies the conflict with this Court's prior decisions. It is the "purpose" of the statute (*Halper*, U.S. at 448, S.Ct. at 1902), what the statute is really "designed" to do (*Austin*, S.Ct. at 2811-2812) which is the touchstone of the analysis under

this Court's cases. The ALR statute was designed to punish offenders by taking away their driving licenses for a certain time period, as is clear from the legislative intent. As this Court observed:

> [A] civil sanction that cannot fairly be said solely to serve a remedial purpose, bur rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term.

Halper, U.S. at 448, S.Ct. at 1902. Additionally, like the tax in *Kurth Ranch*, license revocation under the ALR scheme is conditioned upon commission of a crime, namely DWI.

In the instant case, rather than looking to the statutory history of ALR, the Court of Appeals instead looked at the legislative intent of driver's license revocation schemes reviewed almost forty years ago in *Davidson v. State*, 166 Tex.Crim. 376, 313 S.W.2d 883 (Tex.Crim.App. 1958)(opinion on rehearing). *See Noelle,* slip op. at 3. Besides the obvious necessity of revisiting the validity of this case in light of *Halper, Austin* and *Kurth Ranch,* the statute in question under *Davidson* was *not* designed to act as

another means of punishment for a criminal offense. ALR plainly was so intended, and is one of the reasons for its widespread legal challenges in this state and others. The *Noelle* decision, as well as the Court of Criminal Appeals' *Tharp* opinion, conflicts with *Halper, Austin* and *Kurth Ranch*.

ii. **ALR is not remedial.**

Not only did the Court of Appeals decide that ALR was not punishment under the Fifth and Fourteenth Amendments to the United States Constitution, it held that license revocation for DWI was purely remedial because it was "designed solely for the protection of the public in the use of the highways." *Noelle,* slip op. at 3. Petitioner contends, as she did before the state appellate courts, that not only is ALR *not* solely remedial, *it is not remedial at all*. The *Arnold* opinion underscores the point by asserting that ALR was "intended to make the roads safer, not to punish the defendant." *Arnold* at 641. This faulty conclusion will not withstand scrutiny. As Petitioner argued to the Court of Appeals, the Texas ALR scheme is not remedial because it does not remove

drunk drivers from the roads. In fact, the person arrested has the right to travel unless and until a judge decides that the license be suspended. TEX. TRANSPORTATION CODE, § 524.035(b). Otherwise the person is free to drive again once released from jail. The ALR rationale -- that the public is somehow made safer because a person suspected of DWI subsequently has her license suspended for a time -- is thus based on a false premise, if taken at its face.

The Court of Appeals' rationale also assumes that *every* person arrested for DWI in Texas invariably returns to the road intoxicated, that this return just *happens* to coincide with the suspension period, and that a suspension will become a remedy by erasing this future crime out of reality. In other words, ALR assumes a future crime, then provides the "remedy" of license suspension. But if such a pre-crime suspension was really meant to be a remedy, it is an empty one: suspending a person's license does not actually prevent that person from drinking and driving; it merely makes him guilty of an additional offense, namely, driving while license suspended. However, if pre-crime suspension is

meant to deter the presumed *criminal-of-the-future* from committing his future crime, then it has a logical ***but clearly non-remedial purpose and effect.*** Thus, even swallowing the patently absurd assumption that every DWI arrestee will re-offend during his designated crime-period, an ALR suspension really acts just like any other criminal penalty, and nothing at all like a true remedy.

An application of ALR in this case assumes that Petitioner *would likely commit the future crime of DWI,* and that she would do so during the sixty-day suspension period. Because the State has made no showing whatsoever that Petitioner would re-offend during its sixty-day period, the assumption, even if justified in some other case, is wholly unjustified here. Unless this Court is prepared to genuinely accept the assumptions at work in this statute, and at any rate, unproven in the instant case, ALR cannot be said to offer any true "remedy" in any sense of the word, and constitutes punishment in this case.

This is not to say that there is no legitimate remedy available to the State to address the problem of intoxicated drivers. The real

remedy applied by the State which is both instantaneous and actually succeeds in removing drunk drivers from Texas roads is the same one which has always existed in this State without challenge: the police ***arrest*** the person and the person remains incarcerated and under State control until she sobers up and a magistrate authorizes her release. This available remedy ***may be applied every single time any person drives in Texas while intoxicated, without any sort of constitutional infirmity or double jeopardy implication***. Thus, the claim advanced by the State that a vindication of double jeopardy guarantees will leave the State without any remedy for providing public safety against intoxicated drivers ignores the State's power to make warrantless arrests of drivers suspected of DWI. By clutching to the rhetoric that "ALR removes drunk drivers from Texas highways," the appellate court again, in a fundamental way, misconstrues the ALR statute.

Finally, the court of appeals cites the nationwide survey of decisions from *Helber v. State*, 915 S.W.2d 955 (Tex.App. -- Houston [1st Dist.] 1996, *no pet.*) presumably as authority for its

decision. "Everybody else is doing it" is not a defense for criminal defendants and ought not to be a justification for Texas appellate courts to aid and abet clear, deliberate legislative attempts to dress a criminal law with administrative clothing in violation of the double jeopardy principles simply to ensure that those accused of DWI may be repeatedly punished.

C. **Expansion of Argument Relating to Question Two**

Petitioner argued in the lower courts that ALR violated federal double jeopardy provisions because the administrative proceeding set forth in TEX. TRANSPORTATION CODE, § 524.001, *et seq.*, constitutes a criminal prosecution. The Court of Appeals faulted Petitioner because she provided no authority that an administrative proceeding can also be a criminal prosecution. However, no such authority exists because the Texas Legislature has not heretofore employed administrative proceedings as a substitute for criminal law. Petitioner did direct the lower courts to this Court's long-standing recognition that

> the Double Jeopardy Clause protects an individual against more than being subjected to double

> punishments. It is a guarantee against being twice put to *trial* for the same offense.

Abney v. United States, 431 U.S. 651, 660, 52 L.Ed.2d 691, 97 S.Ct. 2034, 2040 (1977)(emphasis in original). *See also North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 670 (1969)("a person need run the gauntlet only once."); *Green v. United States*, 355 U.S. 184, 187-188, 78 S.Ct. 221,224, 2 L.Ed.2d 199 (1957). The Texas Court of Criminal Appeals has already plainly explicated this principle:

> The [Fifth Amendment] prohibition is not against being twice punished, but against being twice *put* in jeopardy . . .. The 'twice put in jeopardy' language of the Constitution thus relates to a potential, i.e., the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried. [citations omitted] Because of this focus on the risk of conviction, the guarantee against double jeopardy assures an individual that, among other things, he will not be forced, with certain exceptions, to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense. It thus protects interests wholly unrelated to the propriety of any subsequent conviction.

Ex parte Robinson, 641 S.W.2d 552, 554-555 (Tex.Crim.App. 1982). *See also Rice v. State*, 861 S.W.2d 925 (Tex.Crim.App.

1993); *Ex parte Rathmell*, 717 S.W.2d 33 (Tex.Crim.App. 1986).

The Double Jeopardy Clause does not contain the words "prosecution" or "conviction." Instead, the constitutional protection is more broadly stated, proscribing putting a person twice in jeopardy for the same offense. The offense in this case is the same for either the administrative revocation or the subsequent prosecution: both are predicated on the criminal offense of driving while intoxicated, and the allegations make it clear that it is an identical event which gives rise to both proceedings. *See Ex Parte Voisinet,* 935 S.W.2d 424 (Tex.Crim.App. 1996), in which the Texas Court of Criminal Appeals held that, for purposes of the federal jeopardy provisions, TEXAS REV. CIV. STATS. article 6687b-1, now codified as TEX. TRANSPORTATION CODE § 524.001, *et seq.*, and TEX. PENAL CODE § 49.04(a) are the same offense. Therefore, the only remaining question is whether Petitioner was put in jeopardy in the administrative proceeding.

The court below apparently determined that Petitioner could not have been in jeopardy before the administrative court because

she was not criminally prosecuted in the administrative court. Petitioner was not prosecuted in the administrative court, the appellate court reasoned, because it did not have jurisdiction to try a criminal case.[2] Therefore, Petitioner was not put in jeopardy. The court's entire rationale is based on the appellate court's question-begging premise that "Petitioner was subjected only to an administrative proceeding." *Noelle*, slip op. at 4.

The appellate court referenced as authority a case cited by Petitioner on appeal, *Kepner v. United States*, 195 U.S. 100, 128 (1904), which holds that "a person has been in jeopardy when he is regularly charged with a crime before a tribunal properly organized and competent to try him." Petitioner was certainly charged with a crime; the administrative proceeding was certainly competent to "try" its accusatory pleading, and the administrative court certainly had jurisdiction under the ALR law to render a finding that the State proved that Petitioner had committed a penal offense. And

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[2] In fact, the statute includes a provision specifying that ALR is a civil matter, and does not preclude a subsequent criminal prosecution. TEX. TRANSPORTATION CODE § 524.012(e).

Petitioner's license was suspended. Yet, somehow, the jeopardy concept refused to take hold at the lower court, evidently because the Legislature simply did not call ALR what it really is: an administrative substitute for criminal prosecution and punishment. "Double jeopardy may not be . . . nullified by the mere forms of criminal proceedings." *United States v. Broce*, 488 U.S. 563, 584, 109 S.Ct. 757, 770, 102 L.Ed.2d 927 (1989).[3] For purposes of double jeopardy, Petitioner has already been placed in jeopardy for the same offense, and the Court of Appeals erred in concluding otherwise.

As discussed above, the Texas Court of Criminal Appeals has recently handed down two opinions dealing with ALR, *Voisinet* and *Tharp*. In *Tharp*, the court held that an administrative

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[3] *See also United States v. Oppenheimer*, 242 U.S. 85, 88, 37 S.Ct. 68, 69, 61 L.Ed. 161, 164 (1916), quoting *The Queen v. Miles*, 24 Q.B.D. 423, 421, "Where a criminal charge has been adjudicated upon by a court having jurisdiction to hear and determine it, that adjudication, whether it takes the form of an acquittal or conviction, is final as to the matter so adjudicated upon, and may be pleaded in bar to any subsequent prosecution for the same offense. . . . In this respect the criminal law is in unison with that which prevails in civil proceedings."

suspension of a person's drivers license under the ALR statute did not constitute punishment for purposes of the Fifth Amendment's Double Jeopardy Clause and thus a person's subsequent prosecution for driving while intoxicated after an ALR suspension would not implicate the protection against multiple punishments for the same offense. *Tharp*, 935 S.W.2d at 161.

Petitioner's contention is related to that in *Tharp*, but fundamentally different because its focus is the nature of the ALR proceeding rather than the nature of the license suspension. This multiple prosecution claim was never reached in *Voisinet* because the lower appellate court held that the issue was "pretermitted." *Voisinet v. State*, 909 S.W.2d 262, 263 (Tex.App. -- Houston [14th] 1995), *vacated and remanded, Ex Parte Voisinet*, 935 S.W.2d 424 (Tex.Crim.App. 1996). However, neither the Court of Criminal Appeals nor any Texas Court of Appeals appears to have addressed Petitioner's argument. *See*, *Johnson v. State,* 920 S.W.2d 692 (Tex.App. -- Houston [1st Dist.]1996, *pet. ref'd*), *Aguilar v. State*, 901 S.W.2d 740 (Tex.App. -- San Antonio 1995,

pet. granted), *State v. Brabson*, 899 S.W.2d 741 (Tex.App. -- Dallas 1995, *no pet.*); *Ex parte Arnold*, 916 S.W.2d 640 (Tex.App. -- Austin 1996, *pet. ref'd*).[4] If this Court should decide that license suspension under the Texas statute is not punishment, the present claim that a prosecution after an ALR hearing is barred by the Double Jeopardy Clause should be addressed.

CONCLUSION

Subsequent prosecution of Petitioner for DWI will subject her to multiple punishments because she has already been punished by the suspension of her drivers license. In addition, she has already been placed in jeopardy by the ALR proceeding. Consequently, further prosecution of this cause in the Williamson County Court is barred by the double jeopardy provisions of the United States Constitution.

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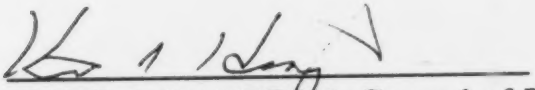
[4] Other state courts of last resort have rejected this contention. *E.g.*, *State v. Gustafson*, 76 Ohio St. 3d 425, 435-437, 668 N.E.2d 435, 433-445 (Ohio Sup. Ct. 1996); *State v. Strong*, 158 Vt. 56, 63, 605 A.2d 510 (Vt. Sup. Ct.1992).

PRAYER FOR RELIEF

Therefore, Petitioner ANGELA NOELLE prays that this Honorable Court issue a Writ of Certiorari to review the judgment of the Third Court of Appeals denying habeas corpus relief in this case.

Respectfully Submitted,



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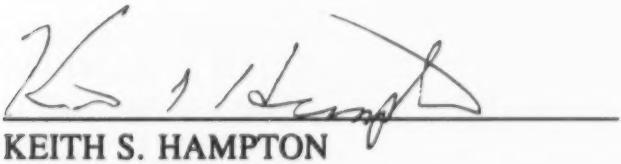
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was delivered via the United States Postal Service to the offices of the Williamson County Attorney, 405 S. Martin Luther King Blvd., Georgtown, Texas, 78626, on this day, May 13, 1997.



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